



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

March 31, 2021

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17120

RE: A-2019-3013783

Dear Secretary Chiavetta,

Enclosed for filing please find the Department's *Main Brief* in the above-captioned matter.

I hereby certify that a copy has been sent to all parties of record as indicated by the Certificate of Service.

Very truly yours,

Stephen Howard

Stephen C. Howard
Assistant Counsel

Cc: Administrative Law Judge Darlene D. Heep (email)
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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of CSX Transportation, Inc., for :
approval of the abolition of the Crossing : Docket No. A-2019-3013783
(DOT No. 140 634 G) where Cemetery Avenue :
crosses, above grade, the tracks of CSX :
Transportation, Inc., located in the City of :
Philadelphia, Philadelphia County :

**MAIN BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION**

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STATEMENT OF THE QUESTIONS INVOLVED

1. Is it just and reasonable to allocate the current and future maintenance, future costs, reimbursement of expenses, and alteration or abolition expenses of the Cemetery Avenue crossing to PennDOT?

Suggested Answer: No

STATEMENT OF THE CASE

On October 24, 2019, CSX Transportation, Inc. (“CSXT”) filed an Application seeking approval to abolish the public rail-highway crossing where CSXT’s tracks cross under a highway bridge carrying Cemetery Avenue in the City of Philadelphia (“Crossing”). The Public Utility Commission (“Commission”) confirmed receipt of the Application by Secretarial Letter dated October 24, 2019. On February 26, 2020, the Commission’s Bureau of Technical Utility Services, Rail Safety Section (“Rail Safety”), the Pennsylvania Department of Transportation (“PennDOT”), CSXT, the Philadelphia Water Department, the City of Philadelphia Department of Streets (“City”), and a local landowner attended the first inspection and field conference.

Rail Safety requested that the matter be referred to the Office of Administrative Law Judge (“OALJ”) on August 11, 2020. On August 19, 2020, a Call-in Telephone Conference Notice was issued, scheduling a telephonic prehearing conference for September 29, 2020, before Administrative Law Judge Darlene Heep. On August 20, 2020, a Prehearing Conference Order was issued. On August 26, 2020, a corrected Hearing Notice and Prehearing Order were issued, converting the Initial Telephone Conference into a Prehearing Conference. The parties were instructed to provide Prehearing Memoranda on September 28, 2020. On February 10, 2021, a telephonic hearing was held where CSXT, PennDOT, the PUC Bureau of Investigation and Enforcement (“I&E”), and the City presented evidence regarding the potential abolition of the Crossing by removal of the bridge and future maintenance of the bridge should the request to remove the bridge be rejected. At that hearing, the parties agreed to submit briefs by March 31, 2021¹.

¹ By later request of counsel, Main Briefs are now due April 1, 2021.

This matter is before the Commission to determine whether the application to abolish the Crossing and remove the bridge should be granted or should the Crossing remain open, the future cost allocation and maintenance responsibilities of the bridge.

SUMMARY OF THE ARGUMENT

The Commission is vested with the exclusive authority to order a highway-rail crossing to be altered, suspended, or abolished and to allocate costs and assign maintenance responsibilities. In evaluating a rail-highway crossing matter, the Commission is not limited to any fixed rule but must take all relevant factors into consideration, with the fundamental requirement being that its order is just and reasonable. Some of the consistently relied upon relevant factors for the allocation of highway-rail crossing maintenance responsibilities, repair and replacement, and costs are: 1) the party that originally built the crossing, 2) the party that owned and maintained the crossing, 3) the relative benefit conferred on each party with the construction of the crossing, 4) whether each party is responsible for the deterioration of the crossing that has led to the need for its repair, replacement, or removal, 5) and the relative benefit that each party will receive from the repair, replacement, or removal of the crossing.

The Commission is not required to set forth an analysis of these five factors since such a practice would hold PUC to a more rigorous standard in expressing its reasons for a cost allocation determination and would unnecessarily infringe upon the discretionary aspect of its decision. The Commission has considered other factors such as the availability of state and/or federal funding for a project and the general equities of the case in its determination. Overall, the Commission has wide latitude to determine which factors are relevant when allocating costs within the context of the case before it.

Considering all relevant factors, it would not be just or reasonable for the Commission to assign any costs or maintenance responsibility relating to Crossing. PennDOT's involvement with the Crossing at Cemetery Avenue is limited to its federal statutory obligation to ensure the inspection of bridges of this type. PennDOT is not the party that originally constructed the bridge. PennDOT neither owns nor maintains any aspect of the Crossing. PennDOT did not benefit from the original construction of the Crossing or the existence of the Crossing. PennDOT is not responsible for any deterioration of the bridge that has led to the need for its repair, replacement, or removal. Finally, PennDOT will receive no benefit from the repair, replacement, or removal of the crossing.

ARGUMENT

I. IT WOULD NOT BE JUST AND REASONABLE TO ASSIGN ANY ITEMS OF WORK OR THE COSTS THEREOF TO PENNDOT.

PennDOT does not have a position regarding whether or not the crossing should be abolished; however, PennDOT argues that the law supports a finding that it would not be just and reasonable for it to be ordered to do any work or to bear any costs.

It is well established that the Commission has jurisdiction over rail-highway crossings. 66 Pa.C.S. § 2702. The Commission also has the exclusive authority to allocate the costs related to the creation, maintenance, repair, replacement, or removal of a crossing. 66 Pa.C.S. § 2704(a). In evaluating a rail-highway crossing matter, the Commission is not limited to any fixed rule but must consider all relevant factors, with the fundamental requirement being that its order is just and reasonable. *AT&T v. Pa. P. U. C.*, 737 A.2d 201, 213 (1999). Reviewing courts will not overturn an allocation of costs or responsibilities unless it is unjust or unreasonable. *Phila. V. Pa. P.U.C.*, 676 A.2d 1298 (Pa. Cmwlth. 1995).

- a. The Commission is not limited to any set or fixed test but considers all relevant factors based upon a case-by-case analysis.

The Commission, while not limited to any fixed rule, has consistently relied upon certain relevant factors for the allocation of highway-rail maintenance responsibilities, repair and replacement, and costs:

1. The party that originally built the crossing.
2. The party that owned and maintained the crossing.
3. The relative benefit conferred on each party with the construction of the crossing.
4. Whether each party is responsible for the deterioration of the crossing that has led to the need for its repair, replacement, or removal.
5. The relative benefit that each party will receive from the repair, replacement, or removal of the crossing.

N. Lebanon Twp. v. Pa. P.U.C., 962 A.2d 1237, 1247 (Pa. Cmwlth. 2008) (citing *Greene Twp. Bd. of Supervisors v. Pa. P.U.C.*, 668 A.2d 615, 619 (Pa. Cmwlth. 1995)). The Commission is not required to set forth an analysis of these five factors since such “a practice . . . would hold PUC to a more rigorous standard in expressing its reasons for a cost allocation determination [and] would unnecessarily infringe upon the discretionary aspect of [its] decision” *Millcreek Twp. v. Pa. P.U.C.*, 753 A.2d 324 (Pa. Cmwlth. 2000) (quoting *AT&T v. Pa. P. U. C.*, 737 A.2d 201 (1999)). However, the Commission can consider other factors such as the availability of state and/or federal funding for a project and the general equities of the case in its determination. *Erie L.R. Co. v. Pa. P.U.C.*, 278 A.2d 188 (Pa. Cmwlth. 1971); *SEPTA v. Pa. P.U.C.*, 802 F. Supp. 1273, 1273 (E.D. Pa. 1992); *Application of the City of Wilkes-Barre*, Docket No. A-00101606, 1981 Pa. PUC LEXIS 102, *5-*6 (Order entered April 9, 1981). Overall, the Commission has wide latitude “to determine

which factors are relevant in assessing costs within the context of the particular case before it.”
Bell Atl. Pa. v. Pa. P.U.C., 672 A.2d 352, 355 (Pa. Cmwlth. 1995).

- b. An analysis of the relevant factors demonstrates that it would not be just and reasonable for the Commission to allocate any responsibility or any costs associated with this Crossing to PennDOT.

In the instant case, the Commission should consider all the above factors as each applies. They are: (1) The party that originally built the crossing; (2) The party that owned and maintained the crossing; (3) The relative benefit conferred on each party with the construction of the crossing; (4) Whether each party is responsible for the deterioration of the crossing that has led to the need for its repair, replacement, or removal; (5) The relative benefit that each party will receive from the repair, replacement, or removal of the crossing; (6) the availability of state and/or federal funding for a project; and (7) the equities of the matter.

i. CSXT's predecessor-in-interest, the Baltimore and Ohio Railroad, originally constructed the Cemetery Avenue Bridge

In *Greene Twp.*, the Commonwealth Court states that the initial factor the Commission should consider is: “[t]he party that originally built the crossing.” *Greene Twp. Bd. of Supervisors* at 619 citing *Dep’t of Transp. v. Pa. P.U.C.*, 464 A.2d 645 (Pa. Cmwlth. 1983). In *Dep’t of Transp.*, the Commonwealth Court held that it was unreasonable for the Commission to allocate costs associated with relocating railroad facilities made necessary by a bridge rehabilitation project onto the County and Township involved. In short, the court found that because the railroad had built the subject bridge, they should assume such costs. *Dep’t of Transp.* at 533. In each case, the Commission may consider any one of many factors; however, this factor has been relied upon in numerous cases. See *id.*; *Borough of Bridgeville v. Allegheny County.*, Docket No. C-79091518, 1991 Pa. PUC LEXIS 82 (Order entered April 29, 1991); *In Re: Investigation into Montgomery*

Drive, Docket No. I-870030, 70 Pa. PUC 321, 1989 Pa. PUC LEXIS 150 (Order entered July 26, 1989).

In the present case, this factor must be considered. The un rebutted evidence presented demonstrates that the bridge was constructed by CSXT's predecessor-in-interest, Baltimore and Ohio Railroad ("B&O Railroad"). (*CSXT St. 1, pg. 3, lines 11-14; CSXT Exhibit 2*). The original bridge was constructed in 1886 by the B&O Railroad and reconstructed in 1921. The bridge superstructure was last reconstructed in 1961 by the B&O Railroad following a train derailment that destroyed a large portion of the bridge. *Id.* PennDOT was not involved in the construction or design of the bridge. (*See CSXT Exhibit 2*). The fact that PennDOT was not involved in the construction of the bridge should weigh heavily on the Commission when assigning costs and maintenance responsibilities.

ii. PennDOT does not own any aspect of Crossing and has not been assigned any maintenance responsibility for the Crossing by the Commission.

"The party that owned and maintained the crossing" is the second enumerated factor in the *Greene Twp.* analysis and should be considered. *Greene Twp. Bd. Of Supervisors* at 619. However, ownership alone is rarely, if ever, dispositive of the issue and generally is considered as part of a benefits analysis. *Compare Dep't of Transp.*, 464 A.2d 645 (Commission may allocate costs onto the Department "regardless of whether the highway involved is a state highway, county road or township road") *with Dep't of Transp. v. Pa. P.U.C.*, 469 A.2d 1149 (Pa. Cmwlth. 1983) (Commission may allocate cost for work done to a state route onto the local authorities based upon benefit to the latter). Furthermore, where ownership is unknown, the Commission must base its decision on other relevant factors. *In Re: Investigation into Ridge Pike*, 2001 Pa. PUC LEXIS 210 (Commission Order, October 26, 2001).

Generally, a bridge is owned by the entity whose traffic it carries. *City of Phila. v. CONRAIL*, 747 A.2d 352, 357 (2000). However, this rule only applies where there are insufficient indicia that legal title lies with another entity. *City of Phila. v. CONRAIL*, 747 A.2d 352, 357 (2000) (Saylor, J., concurring).

Here, it is undisputed that CSXT is the owner and operator of the line of railroad under this highway bridge. (*CSXT St. 1, pg. 2, lines 20-22*). According to CSXT Exhibit 2, CSXT's predecessor-in-interest, the B&O Railroad, was assigned the maintenance responsibility for the bridge substructure and superstructure, and the City was assigned maintenance responsibility for the approaches. (*City St. 1, pg. 3, lines 19-21*). CSXT is responsible for maintenance of the bridge items such as the bridge pedestrian railing, bridge sidewalk, bridge concrete deck, substructures, superstructure, and bridge expansion joints. *Id.* The bridge carries a City street and the City is responsible for the roadway, bridge regulatory and advanced warning signs, sidewalk approaches, roadway approaches, and roadway surface across the bridge. *Id.* For a locally maintained roadway, snow, ice, trash, and debris removal is typically assigned to the local municipality as they control the ordinances for garbage, snow, ice, and debris removal within that municipality. (*I&E St. 1, pg. 9, lines 14-21*).

As the 1961 PUC order, CSXT Exhibit 2, demonstrates, PennDOT did not have any involvement in the construction of the bridge nor does it have any current maintenance obligation relating to the bridge or the Crossing. Furthermore, PennDOT does not have any ownership interest in the bridge since the bridge carries a City street. (*City St. 1, pg.2, line 20*). To the extent that PennDOT is interested in the bridge in question, it relates to the Department's legal obligation to inspect, or cause to be inspected, all highway bridges located on public roads that are fully or

partially located within the State's boundaries as required by 23 CFR 650.307. (*Department St. 1, pg. 2, lines 11-12; Department St. R-3, page 1, lines 8-12; City St. 1, pg. 4, line 10*).

Though PennDOT has no ownership or maintenance responsibility for this Crossing, it has opined that if the bridge is removed there must be consideration of the impacts on all modes of transportation, including bicycle and pedestrian traffic and that those impacts have not yet been properly addressed. (*Department St. 2, pg. 2, lines 13-23*). PennDOT's lack of ownership interest or maintenance responsibility should be dispositive in this case.

iii. CSXT's predecessor-in-interest and the City of Philadelphia received the benefits conferred in the Crossing construction.

Under Greene Twp., the Commission can consider the benefits of the crossing between the parties. *Greene Twp. Bd. of Supervisors v. Pa. P.U.C.*, 668 A.2d 615, 619 (Pa. Cmwlth. 1995). CSXT's predecessor-in-interest, the B&O Railroad and the City both received benefits from the construction of the bridge in question. The B&O Railroad received the benefit of separating the railroad tracks from the roadway. (*CSXT St. 1, pg. 7, lines 9-11*). The City benefitted from the crossing because it is a necessary link to maintain a redundant transportation system. (*City St. 1, pg. 1, lines 13-16*). The railroad divides the neighborhood with only a few connections between the two sides. *Id.* It becomes a critical link when one of the other crossings are unavailable. *Id.* No party has contended that PennDOT received the primary, or even tangential, benefit from the construction of the original bridge. PennDOT was not involved in the original construction and received no benefit from the construction of the Crossing. (*See generally, Department St. 1, pg. 2 lines 5-18, CSXT St. 's 1-2 and City St. 's 1-2*).

iv. PennDOT is not responsible for the deterioration of the bridge that has led to the need for its repair, replacement, or removal.

In determining the allocation of costs, the court in *Greene Twp. acknowledged that the party who is responsible for the deterioration of the crossing is a factor that should be considered. Greene Twp. Bd. of Supervisors v. Pa. P.U.C., 668 A.2d 615, 619 (Pa. Cmwlth. 1995).*

In the present case, CSXT and the City disagree as to which party truly contributed to the deterioration of the bridge; however, no party alleges that PennDOT has contributed to the deterioration of the bridge. (*See, Department St. 1, pg. 2 lines 5-18, City St. 1, Pg. 6, lines 16-22 and CSXT St. 1, Pg. 4, lines 19-23 and pg. 5, lines 1-4* (discussing each party's respective upkeep or the lack thereof)). As discussed above, PennDOT was not assigned any maintenance responsibility relating to the bridge structure or the roadway it carries and is not responsible for the deterioration of the bridge.

v. PennDOT will not receive a benefit from the repair, replacement, or removal of the crossing.

Under *Greene Twp.*, the court has found that “[t]he relative benefit that each party will receive from the repair, replacement or removal of the crossing” is a relevant factor to be weighed in the allocation of costs among parties. *Greene Twp. Bd. of Supervisors v. Pa. P.U.C., 668 A.2d 615, 619 (Pa. Cmwlth. 1995).* In *Pittsburgh & L. E. R. Co. v. Pa. P.U.C.*, the court found that the railroad benefits when a bridge is rehabilitated or reconstructed due to the nature of a grade-separated crossing. *Pittsburgh & Lake Erie R.R. Co. v. Pa. P.U.C. 556 A.2d 944 (Pa. Cmwlth. 1989).* These benefits were specifically identified as the elimination of the need for, and maintenance of, automatic crossing signals and the uninhibited use of its rail line. *Id.* This bridge was constructed by the B & O Railroad to carry Cemetery Avenue over the railroad track. (*CSXT Exhibit 2*).

In the present case, all benefits from the repair, replacement, or removal of the crossing are afforded to CSXT and the City. PennDOT testified that it does not benefit from the existence of the bridge and that it will not benefit from the removal. The bridge is not integral to the state highway system in the area. PennDOT acknowledged that the bridge is probably important to the City. Department St. 2, pg. 2, lines 6-9. CSXT sees a benefit from a grade separated crossing. The City will benefit from the Crossing remaining in place and repaired because it is a necessary link to maintain a redundant transportation system. (*City St. 1, Pg. 1, lines 3-26*). The City further contends that the railroad divides the neighborhood with only a few connections between the two sides. *Id.* According to the City, the crossing becomes a critical link when one of the other crossings is unavailable. *Id.*

Furthermore, Joseph Ruff, a Lieutenant with the Philadelphia Police Department, contends that police officers answer calls every day in the vicinity of the Bridge. (*City St. 2, Pg. 2, lines 1-4*). According to Lieutenant Ruff, there have been 195 Part 1 crimes in the vicinity of the bridge, and approximately 4500 calls for service in the immediate area. *Id.* The above demonstrates that the City would benefit from the repair of the Crossing.

Further, no party testified as to any benefit to PennDOT and it would not be just and reasonable to find any benefit ensuing to PennDOT.

vi. There is no state and/or federal funding available for any work at the Crossing.

Another factor relevant to the Commission's cost allocation analysis is the availability of federal or state funding. Wilkes-Barre, 1981 Pa. PUC LEXIS 102. See PECO Energy Co. v. Pa. P.U.C., 791 A.2d 1155, 1164 (2002) (Supreme Court affirmed Commission's consideration of the lack of federal funding in allocating utility relocation costs); Phila. v. Pa. P.U.C., 822 A.2d 94 (Pa.

Cmwlth. 2003) (Commonwealth Court held that the Commission adequately considered the funding factor).

There are no state or federal funds available for any work at this Crossing. (Department St. 1, pg. 3-4, lines 18- 3). For any proposed project to be funded, the project sponsor must go through a process. The first step is to get the project on the Transportation Improvement Plan (“TIP”). The TIP is the regionally agreed-upon list of priority transportation projects that would use federal funds. Projects are vetted at the county or major city level to determine which projects have merit and get submitted for consideration. The proposed projects from the local levels then get prioritized by the Regional Technical Committee. For a project to get on the TIP, a member of the Delaware Valley Regional Planning Commission (“DVRPC”), the metropolitan planning organization for the area, must submit it for consideration. (Department St. R3, Pg. 1-2, Lines 14-3).

The Cemetery Avenue bridge is not on the TIP it is not on the Twelve-Year Plan either. Therefore, there are no state or federal funds available for the Crossing. (*Department St. 2, Pg. 4, Lines 4-21*). Depending upon the scope of work to be performed on Cemetery Avenue federal funds could be available since it is a Federal Aid Route. *Id.* If the bridge is removed Cemetery Avenue may lose its Federal Aid Route designation. *Id.* This means that the City would not be able to use federal funds for any work on Cemetery Avenue. PennDOT cannot and will not commit to participating in the cost of any work to repair the bridge or to abolish the Crossing. In addition to not being on an approved TIP or a Twelve-Year Plan, the Cemetery Avenue bridge over CSX is not on an approved capital budget or bridge bill enabling expenditure of state transportation funds. *Id.* PennDOT is willing to review any plans for any work at this Crossing at its sole cost and expense. (*Department St. 1, pg. 4, lines 13-21*).

CSXT can advocate for the bridge to be included on the TIP, but that does not mean that it is a foregone conclusion that the project will get on a TIP. (*Department Rebuttal 2, Pg. 3, Lines 4-8*). In order to be placed on TIP, the project has to be approved by the County and the Regional Planning Commission. *Id.* It would have to meet the priorities of the region just like any other project. *Id.*

vii. It would be inequitable to assign any responsibilities or the costs thereof to PennDOT.

Finally, the Commission can also consider the general equities of the case in its determination. *Erie L.R. Co. v. Pa. P.U.C.*, 278 A.2d 188 (Pa. Cmwlth. 1971); *SEPTA v. Pa. P.U.C.*, 802 F. Supp. 1273, 1273 (E.D. Pa. 1992); *Application of the City of Wilkes-Barre*, Docket No. A-00101606, 1981 Pa. PUC LEXIS 102, *5-*6 (Order entered April 9, 1981).

A thorough review of the evidence presented in this matter and the case law cited herein, makes it abundantly clear that it would be inequitable to sign any costs or responsibilities to PennDOT for this crossing. PennDOT did not construct the bridge; it does not have any maintenance responsibilities for the bridge; it does not reap any benefit from the existence of this crossing nor will it reap any benefit from the abolition of the Crossing or the repair of the bridge; it is not responsible for the deterioration of the bridge; and, there are no federal or state funds available for any work at this crossing

PROPOSED FINDINGS OF FACTS

1. The bridge that carries Cemetery Avenue over the railroad was constructed by CSXT's predecessor-in-interest, Baltimore and Ohio Railroad ("B&O Railroad") (*CSXT St. 1, Pg. 3, lines 11-14; CSXT Exhibit 2*).
2. CSXT is the owner and operator of the line of railroad under this highway bridge. (*CSXT St. 1, Pg. 2, Lines 20-22*).
3. CSXT's predecessor-in-interest, the B&O Railroad, was assigned maintenance responsibility for the bridge substructure and superstructure, and the City was assigned maintenance responsibility for the approaches. (*City St. 1, Pg. 3, Lines 19-21; CSXT Exhibit 2*).
4. CSXT Transportation, Inc. is responsible for maintenance of the bridge items such as the bridge pedestrian railing, bridge sidewalk, bridge concrete deck, substructure, superstructure, and bridge expansion joints. (*City St. 1, pg. 3, lines 19-21*).
5. The bridge carries a City of Philadelphia street, Cemetery Avenue. The City of Philadelphia is responsible for the roadway, bridge regulatory and advanced warning signs, sidewalk approaches, roadway approaches, and roadway surface across the bridge. (*City St. 1, pg. 3, lines 19-21*).
6. PennDOT does not have any current maintenance obligation relating to the bridge or the Crossing. Furthermore, PennDOT does not have any ownership interest in the bridge. (*Department St. 1, pg.2, lines 5-12; CSXT Exhibit 2*).
7. PennDOT has not received the primary or even a tangential benefit from the construction of the original bridge or the existence of the Crossing. (*Department St. 2, pg. 2 lines 6-9; See Generally, City St.s 1-2 and CSXT St.s 1-2*).

8. PennDOT was not involved in the original construction and has not received any benefit from the construction of the Crossing. (*CSXT St. 1, Pg. 3, lines 11-14; CSXT Exhibit 2*).
8. PennDOT has not contributed to the deterioration of the bridge. (*See Generally, City St.s 1-2 and CSXT St.s 1-2*).
9. Both CSXT and the City have benefited from the existence of the Crossing. (*City St. 1, Pg. 1, lines 3-26*).
10. CSXT will benefit by the removal of the bridge because they will no longer have maintenance responsibility. (*See, Department St. 1, pg. 2 lines 5-18, City St. 1, Pg. 6, lines 16-22 and CSXT St. 1, Pg. 4, lines 19-23 and pg. 5, lines 1-4*).
11. The Cemetery Avenue bridge is a necessary link to maintain a redundant transportation system within the City and is a critical link when another crossing is unavailable. (*City St. 1, pg. 2, lines 14-16*).
12. City police officers use the bridge frequently every day and respond to calls daily in the vicinity of the Cemetery Avenue bridge. (*City St. 2, pg. 1-2, lines 19-5*)
13. There are no state or federal funds available for the Crossing. (*Department St. 2, Pg. 4, Line3*).
14. The traffic study submitted by CSXT, CSXT Exhibit 4, did not address all modes of traffic, including bike and pedestrian traffic. The impacts upon all modes of transportation should be considered in the analysis of whether the bridge should be removed. (*City St. 1. Pgs. 9-10, lines 13-13; Department St. 2, pg. 2, lines 13-23*).
15. The removal of the Cemetery Avenue bridge will divert all modes of traffic to other bridges. Those bridges need to be reviewed to determine if any mitigation is required at those

locations so that they can safely handle the increase in traffic. (*City St. 1, pg. 9-10, lines 13-13; Department Statement 2, pg. 3, lines 2-11*).

16. PennDOT will not bear any costs for any work to be performed at this Crossing. (*Department St. 1, pg. 4, lines 13-21*).

17. PennDOT has agreed to perform any plan review at its sole cost and expense. (*Department St. 1, pg. 4, lines 13-21*).

PROPOSED CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and parties to this proceeding. 66 Pa.C.S. §§102, 501, 2702 et seq.

2. The Commission has exclusive jurisdiction to regulate the construction, relocation, suspension, abolition or alteration of railroad facilities that cross any other public utility or a public highway either at grade or above or below grade as well as the authority to determine and order which concerned parties should perform such work, in order to prevent accidents and promote the safety of the public. 66 Pa.C.S. § 2702.

3. In appropriating costs in railroad crossing cases, the Commission is not limited to any fixed rule but must take all relevant factors into consideration, with the fundamental requirement being that it is just and reasonable. *AT&T v. Pa. P. U. C.*, 737 A.2d 201, 213 (1999); *Greene Twp. Bd. of Supervisors v. Pa. P.U.C.*, 668 A.2d 615 (Pa. Cmwlth. 1995).

4. The Commission, while not limited to any fixed rule, has consistently relied upon certain relevant factors for the allocation of highway-rail maintenance responsibilities, repair and replacement, and costs: the party that originally built the crossing; the party that owned and maintained the crossing; the relative benefit conferred on each party with the construction of the

crossing; whether each party is responsible for the deterioration of the crossing that has led to the need for its repair, replacement, or removal, and; the relative benefit that each party will receive from the repair, replacement, or removal of the crossing. *N. Lebanon Twp. v. Pa. P.U.C.*, 962 A.2d 1237, 1247 (Pa. Cmwlth. 2008) (citing *Greene Twp. Bd. Of Supervisors v. Pa. P.U.C.*, 668 A.2d 615, 619 (Pa. Cmwlth. 1995)).

5. The Commission can consider other factors such as the availability of state and/or federal funding for a project and the general equities of the case in its determination. *Erie L.R. Co. v. Pa. P.U.C.*, 278 A.2d 188 (Pa. Cmwlth. 1971); *SEPTA v. Pa. P.U.C.*, 802 F. Supp. 1273, 1273 (E.D. Pa. 1992); *Application of the City of Wilkes-Barre*, Docket No. A-00101606, 1981 Pa. PUC LEXIS 102, *5-*6 (Order entered April 9, 1981).

6. The Commission has wide latitude “to determine which factors are relevant in assessing costs within the context of the particular case before it.” *Bell Atl. Pa. v. Pa. P.U.C.*, 672 A.2d 352, 355 (Pa. Cmwlth. 1995).

7. It would not be just and reasonable to assign PennDOT any of the costs to maintain, repair, replace, rehabilitate and/or remove the Cemetery Avenue bridge. *Greene Twp. Bd. Of Supervisors v. Pa. P.U.C.*, 668 A.2d 615, 619 (Pa. Cmwlth. 1995); *Erie L.R. Co. v. Pa. P.U.C.*, 278 A.2d 188 (Pa. Cmwlth. 1971); *SEPTA v. Pa. P.U.C.*, 802 F. Supp. 1273, 1273 (E.D. Pa. 1992); *Application of the City of Wilkes-Barre*, Docket No. A-00101606, 1981 Pa. PUC LEXIS 102, *5-*6 (Order entered April 9, 1981).

CONCLUSION

The Department of Transportation respectfully requests, that based on the foregoing arguments and the evidence presented at the hearing, the Public Utility Commission determine that it would not be just and reasonable to allocate the any items of work or the cost thereof, to the Department of Transportation. Those responsibilities and costs are properly borne by CSX Transportation, Inc. and/ or the City of Philadelphia consistent with the factors discussed above.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION

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DATED: March 31, 2021

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of CSX Transportation, Inc. for : Docket No. A-2019-3013783
Approval of the Abolition of the Crossing :
(DOT 140 634 G) where Cemetery Avenue : Electronically Filed
crosses above grade the tracks of CSX :
Transportation, Inc. located in the City of :
Philadelphia, Philadelphia County, :
Pennsylvania, and the allocation of cost :
thereto. :

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document by electronic mail as permitted by upon the parties listed below, in accordance with the Emergency Order at M-2020-3019262.

Service by Electronic Mail Only

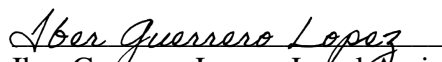
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DEPARTMENT OF TRANSPORTATION


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DATED: March 31, 2021